84-1169

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES PEEBLES,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Federal Circuit affirming the decision of the MERIT SYSTEMS PROTECTION BOARD, notwithstanding the Petitioner's request to the BOARD for a continuance so that he may prepare his defense with the help and advice of counsel, sanctioned such a departure from the usual course of proceedings as to deprive the Petitioner of due process of law?

2. Whether the decision of the United States Court of Appeals for the Federal Circuit affirming the decision of the MERIT SYSTEMS PROTECTION BOARD, notwithstanding the procedural irregularities which occurred at the Petitioner's hearing, sanctioned such a departure from the usual course of proceedings as to deprive the Petitioner of due process of law?

PARTIES

The parties to the proceeding in the Court whose judgment is sought to be reviewed are contained in the caption of the case in this Court.

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In The

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CHARLES PEEBLES,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

Peebles v. United States Postal Service, No. 84-895 (Fed. Cir., October 15, 1984); *Peebles v. United States Postal Service,* No. CH 07528310431, Merit Systems Protection Board, November 28, 1983.

JURISDICTION

This case is an appeal of the judgment entered on October 15, 1984, by the United States Court of Appeals for the Federal Circuit. *Peebles v. United States Postal Service,* No. 84-895 (Fed. Cir., October 15, 1984). Jurisdiction in this Court is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Section 1254

Section 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certifica-

tion the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

5 U.S.C. Section 7513

Section 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days advance written notice unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide by regulation for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof then made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter.

**Employee and Labor Relations Manual,
United States Postal Service,
Section 666.81, Issue 7, June 15, 1982**

666.81. Requirement for Attendance

Employees are required to be regular in attendance.

STATEMENT OF CASE

CHARLES PEEBLES, Petitioner, was an employee of the Respondent, UNITED STATES POSTAL SERVICE. (A-14) On July 25, 1983, a hearing was held before the MERIT SYSTEMS PROTECTION BOARD (MSPB) pursuant to an appeal by the Petitioner of an action by the Respondent removing the Petitioner from his job for violating Section 666.81 of the Employment and Labor Relations Manual. (A-59) At the hearing, counsel for the Petitioner moved for a continuance based upon the fact that his law firm had been retained only a few days earlier and had not had time to prepare and the fact that the Respondent had been incapacitated throughout the time he was to have prepared a defense. (A-12) The motion was denied. (A-13)

At the hearing, the MSPB received evidence which indicated that the Petitioner had been absent from work from January 3, 1983 to March 9, 1983. (A-16) On January 4, 5 and 6, 1983, Petitioner's mother called the Respondent and notified them of her son's illness. (A-43) She was informed that it was not necessary for him to call everyday. (A-44) On January 12, 1983, the Respondent mailed

a "five-day" letter by certified mail and regular mail to the Petitioner requesting substantiation within five (5) days for his absence. (A-16) A copy of the certified letter was returned on January 27, 1983, and the regularly mailed letter was not returned. (A-21) Respondent also introduced evidence that a notice of removal was mailed to the Respondent. (A-21)

The Petitioner submitted records to the Respondent in support of his medical absence. (A-55-57) Evidence was introduced at the hearing that the medical documentation submitted by the Petitioner to substantiate his absence was on the stationery of a doctor who had been deceased prior to the dates on the documentation. (A-51)

At the close of the hearing before the MERIT SYSTEMS PROTECTION BOARD, the representative for the Respondent based her arguments on facts and accusations not in the record before the BOARD. (A-51-52) In response to objections made by the Respondent, the BOARD indicated that in reaching its decision it had not considered the matters introduced by the Respondent in her closing argument. However, Petitioner asserts that it is clear from the record that the BOARD improperly considered the matters introduced by the Respondent during her closing argument.

On January 30, 1984, the Petitioner filed an appeal with the United States Court of Appeals for the Federal Circuit. Jurisdiction in that Court was based upon 5 U.S.C. Section 7703. On October 15, 1984, the United States Court of Appeals for the Federal Circuit affirmed the decision of the MERIT SYSTEMS PROTECTION BOARD (*Peebles v. United States Postal Service*, No. 84-895 (Fed. Cir., October 15, 1984).

ARGUMENT

The decision of the United States Court of Appeals for the Federal Circuit affirming the decision of the MERIT SYSTEMS PROTECTION BOARD (BOARD) sanctions such a departure from the usual course of proceedings that the Petitioner was denied due process and requires this Court to exercise its supervisory authority.

The right to be represented by counsel, even at an administrative hearing, is a fundamental right of due process. *Goldberg v. Kelly*, 397 U.S. 254, 9 S.Ct. 1011 (1970). Moreover, the Petitioner had the right under the statute governing proceedings before the Merit Systems Protection Board. 5 U.S.C. Section 7701. The failure of the BOARD to grant the Petitioner's motion for a continuance so that the Petitioner may adequately prepare his case with the help and advice of counsel, served to deprive the Petitioner of the protection of due process. The Petitioner had been unable to prepare his own defense because he had retained counsel only a few days before the hearing. The reason for the Petitioner's failure to begin his preparation earlier was the same reason the Petitioner had been discharged—medical incapacity.

The Petitioner is also guaranteed the right to adequate notice of the charges against him (5 U.S.C. 7513(b); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974).) In the instant case, the Respondent's expert witness on postal employee leave testified that she had instructed someone else to send a notice of the charges by certified mail and by regular mail to the Petitioner. (A-35) The evidence introduced at the hearing showed that a certified letter containing the notice of the charges was returned unopened.

(A-26) The BOARD improperly applied the presumption that the regular letter, if mailed, was received by the Respondent. There was no evidence introduced to show that there had been a mailing of the regular letter. The presumption only applies if there was evidence that the letter had been properly mailed (*Dunlop v. United States*, 165 U.S. 486, 494-495, 17 S.Ct. 375, 377-378 (1897).) The only letter received by the Petitioner was a removal letter informing him that "the reason stated in the Notice of Charges, Charge No. 1" were supported. (A-62) It is essential to a fair proceeding that there be close adherence to statutory and regulatory requirements as to notice of charges against civil service employees proposed to be removed because the notice of charges ordinarily fulfills the function of the complaint, bill of particulars and discovery process in civil litigation (*Benett v. United States*, 402 F.2d 1002, 1004 (Ct. Cl. 1968).)

Furthermore, the hearing was conducted in such a manner as to deny the Petitioner due process. The Petitioner was charged with violating Section 666.81 of the Employee and Labor Relations Manual, which states:

> *666.81 Requirement for Attendance*
>
> Employees are required to be regular in attendance.
>
> Employee and Labor Relations Manual, United States Postal Service, Section 666.81, Issue 7, June 15, 1982.

However, the testimony of the Respondent's own expert witness was that an employee would not be removed from the agency for failure to be in regular attendance if he provided adequate medical documentation. (A-30) The issue was not the length of the Petitioner's absence but the documentation provided to substantiate it. (A-30)

The opinion of the United States Court of Appeals for the Federal Circuit further ignores the irregularities of

the BOARD'S decision and proceedings with respect to the Petitioner's contention that he never received notice. The Court states, "[t]here is no evidence in the record that this letter was returned unclaimed and from the contents of Petitioner's April 28, 1983, appeal it is reasonable to infer that he actually received the notice." (A-3) The Court ignores the fact that there is no evidence in the record that the letter was actually mailed.

With respect to the allegation that the charges were "mislabeled", the Court states that evidence which tended to show that the documents submitted by the Petitioner to the BOARD were falsified was not used to establish a different charge against the Petitioner (A-4) ignores the fact that had the Petitioner known that the stationery of a deceased physician had been used by the physician he had in fact seen, the Petitioner could have proffered evidence to rebut the allegation that the documents were incorrect.

Finally, during the closing argument of the Respondent, the Respondent raised matters highly prejudicial to the Petitioner and not in evidence before the BOARD. (A-51-52) Although the Presiding Officer admonished the Respondent and indicated that the material would not be considered in the BOARD'S decision, the cumulative effect of the foregoing irregularities served to deprive the Petitioner of a full and fair hearing guaranteed by federal statutes and due process. The opinion of the Appellate Court sanctions such irregularities.

If the Petitioner had had the opportunity to be properly notified of the charges against him, he could have been prepared to offer evidence to meet that charge. Had the Petitioner been granted a continuance, he would have been able to have counsel prepare for the case. Had Peti-

tioner and his counsel been informed of the true charges against him, they could have been prepared to meet the charges with evidence that explained the documents. Had the Respondent not raised the matters regarding Petitioner's background without placing some evidence into the record, the Petitioner could have established the falsity of the charges "smuggled" in through the Respondent's closing argument.

CONCLUSION

Wherefore the Petitioner requests this Court grant this petition for a writ of certiorari so that this Court can be fully apprised of the departure from the normal cause of proceedings before the MERIT SYSTEMS PROTECTION BOARD and exercise its supervisory powers over the United States Court of Appeals for the Federal Circuit which sanctioned such a departure.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
No. 84-895

CHARLES PEEBLES, *Petitioner,*	)	
v.	)	CH07528310431
U. S. POSTAL SERVICE, *Respondent.*	)	

JUDGMENT

ON APPEAL from the Merit Systems Protection Board
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

DATED October 15, 1984

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk
/s/ George E. Hutchinson
Clerk

ISSUED AS A MANDATE: November 6, 1984
COSTS: Against, Petitioner
PRINTING $110.56
TOTAL $110.56

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CHARLES PEEBLES, *Petitioner,*	)	
v.	)	Appeal No. 84-895
UNITED STATES POSTAL SERVICE, *Respondent.*	)	

DECIDED: October 15, 1984

Before NIES, NEWMAN and BISSELL, *Circuit Judges.*

BISSELL, *Circuit Judge.*

DECISION

The decision of the Merit Systems Protection Board (Board), CH07528310431, affirming petitioner's removal from the United States Postal Service (agency) is *affirmed.*

OPINION

The agency removed the petitioner from his position as distribution clerk effective April 15, 1983, for being AWOL from January 3, 1983 through March 9, 1983. Petitioner is not challenging the merits of the charge against him; rather, he contends that the agency failed to provide him with adequate notice of the charge and that the Board conducted an unfair hearing.

This court's standard of review is limited by 5 U.S.C. §7703(c). Therefore, this court reviews the Board's decision to determine whether it "complies with the applicable statute and regulations and whether it has a rational basis supported by substantial evidence from the record taken as a whole." *Hayes v. Department of the Navy*, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

Petitioner challenges his removal on procedural grounds. While the Civil Service Reform Act declares that procedural errors can vitiate an agency action if they are "harmful," 5 U.S.C. §7701(c)(2)(A), to be "harmful" the errors must substantially impair the employee's rights. *Brewer v. United States Postal Service*, 647 F.2d 1093, 1097 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 1144 (1982). The burden of showing this harm is on the employee. *Shaw v. United States Postal Service*, 697 F.2d 1078, 1080 (Fed. Cir. 1983). The petitioner has failed to carry his burden on either of his claims.

First, petitioner argues that he received no notice. Although the certified letters were returned unclaimed, the Board found that the agency also sent notice by ordinary mail and this finding is supported by substantial evidence in the record. Petitioner's leave supervisor testified that the notice of charges was sent by ordinary mail to his correct address. There is no evidence in the record that this letter was returned unclaimed and from the contents of petitioner's April 28, 1983, appeal it is reasonable to infer that he actually received the notice.

Second, petitioner asserts three grounds to support his claim of an unfair hearing: (a) denial of a continuance; (b) mislabeling of charges; and (c) improper closing argument. His argument is without merit. The hearing date was July 25, 1983. The Board found that notice of the hearing was sent out on June 17, 1983, and that petitioner had failed

to establish that he had been incapacitated since that time. Even so, the Board extended the hearing for one week to permit petitioner to submit additional evidence, including a statement from his psychiatrist. Petitioner failed to submit that statement and failed to request any additional time to submit it.

Petitioner's assertion that he was denied a fair hearing because the agency mislabeled the charge is not supported by the record. The agency charged him and removed him for being AWOL and at the hearing introduced evidence to support its charge and removal. The agency also introduced evidence that petitioner had submitted to the Board falsified documents, but the purpose of the agency's evidence was to respond to petitioner's evidence. It was not used to establish a different charge against him.

Finally, the agency's closing argument did not deny petitioner a fair hearing. The presiding official expressly stated that he would not regard the argument as evidence, nor would he be persuaded by an argument that did not relate to the evidence. Nevertheless, petitioner contends that the Board's decision reflects a bias resulting from the agency's closing argument. The Board's recitation concerning petitioner's presentation of false evidence is fully supported by the agency's testimony and documentary evidence. Thus, the decision refers to properly admitted evidence pertinent to the period of the charged AWOL and does not refer to any improper content of the agency's closing argument.

We conclude that petitioner has not shown that any erroneous procedure harmed any of his substantial rights. Finding neither legal error nor abuse of discretion, we affirm.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF:	)	
Charles Peebles	)	Decision Number:
	)	CH07528310431
v.	)	
	)	Date:
U. S. Postal Service	)	November 28, 1983
	)	

INTRODUCTION

By petition filed on April 29, 1983, Charles Peebles appealed the adverse action of the United States Postal Service removing him on April 15, 1983 for being absent without leave from his position of Distribution Clerk with the United States Postal Service in Chicago, Illinois.

JURISDICTION

The removal action was effected pursuant to the statutory provisions stated at 5 U.S.C.A. 7511-7513 (West 1980), and the appellant, a preference eligible employee with more than one year of continuous current service in his excepted service position, has both statutory and regulatory rights of appeal to this Board. 5 U.S.C.A. 7511(a)(1)(B), 7512(1), 7513(d) (West 1980); 5 C.F.R. 752.401(a), (b)(2), and .405(a) (1983).

ANALYSIS AND FINDINGS

An agency may take an adverse action against an employee only for such cause as will promote the efficiency

of the service. 5 U.S.C.A. 7513(a) (West 1980). The Board reviews whether the agency's reasons for taking the action are supported by a preponderance of the evidence and are for the requisite cause. 5 C.F.R. 1201.56(a) (1983).

The appellant was removed from his position for being absent without leave (AWOL) during the period of January 3, 1983 through March 9, 1983. He asserts that his absence was due to a nervous condition and high blood pressure. On January 4, 5, and 6, he called in sick and was informed that there was no need to do so every day. He did not, however, call in or otherwise request leave after those dates at all. On January 12, 1983, the Postal Service mailed a letter to the appellant by both regular and certified mail, informing him that the reason for his absence must be substantiated. The certified letter was returned on January 27, 1983. No substantiation was ever received by the Postal Service. On February 22, 1983, the appellant's supervisor submitted a request for his removal. The appellant was sent a notice of the proposal to remove him on March 9, 1983. The appellant did not respond to this proposed action. On March 25, 1983, the Postmaster sent a letter to appellant informing him that the reason for his removal was sustained by the evidence and, therefore, he would be removed effective April 15, 1983.

The appellant, who was present at the hearing but declined to testify in his own behalf, asserts that his absence was caused by illness. In support of this assertion the appellant submitted a statement dated April 27, 1983 on stationery of Douglas L. Parris, M.D. This statement, bearing the apparent signature of Dr. Parris, states that the appellant was under Dr. Parris's professional care and was totally incapacitated from January 19, 1983 to April 27, 1983 by hypertension, hemorrhoids and pain in the left knee and right shoulder (Record at tab 1). However, the

credibility of this excuse was nullified by the agency's showing that Dr. Parris died 3½ years before the date of the statement (Record at tab 10, Agency Exhibits 1 and 2). The appellant's failure to testify in light of this evidence leads me to believe that there is no explanation for the evidence other than the appellant's deliberate presentation of knowingly false information in an attempt to justify his absence.

It is undisputed that the appellant was absent from his position from January 3, 1983 through March 9, 1983. Besides the Dr. Parris statement, the only medical evidence in the record is a statement from Dr. Ramesh Mehta dated January 15, 1983 (Record at tab 1). This statement indicates that the appellant is able to return to work effective January 19, 1983. Assuming that the appellant was disabled *prior* to January 19, 1983, there is no medical evidence concerning his disability *after* that date.

The appellant's mother testified and stated that her son was incapacitated by hypertension, nervousness, and anxiety. This testimony was corroborated by an affidavit from the appellant's neighbor. Initially I note that the appellant's mother is hardly a disinterested witness. However, a more serious difficulty with the mother's testimony is that she is simply unqualified to make a medical or psychological assessment of her son's condition.

At the conclusion of the hearing, the appellant's counsel requested that the record be left open for ten days to allow for the submission of additional evidence not then available, including a statement from the appellant's psychiatrist. The presiding official granted the appellant one week from the close of the hearing to provide such evidence. During the period provided, the appellant sub-

mitted the affidavit of his neighbor, but no statement from any psychiatrist or other mental health professional. Furthermore, there was no request for a further extension of time to submit such material.

Based upon the evidence of record I conclude that the agency's charge of AWOL is sustained by a preponderance of the evidence.

AFFIRMATIVE DEFENSE

The appellant has alleged improper procedure as an affirmative defense. The appellant has the burden of proving his affirmative defense by a preponderance of the evidence. 5 U.S.C.A. 701(c)(2) (West 1980); 5 C.F.R. 1201.56(b) (1983); *Jones v. Department of the Navy*, 7 MSPB 227 (1981).

The appellant asserts that the agency committed procedural error in that the evidence of the apparently falsified medical excuses requires a new charge and reprocessing of appellant's case. Appellant suggests that he is actually being disciplined on the grounds of submitting false documents. Although such a charge might have been brought, the fact that it was not has no bearing on the charge of AWOL which has been established.

EFFICIENCY OF THE SERVICE AND PENALTY IMPOSED

The Board has held that unauthorized absence from duty constitutes proper grounds for taking disciplinary action because such an absence by its very nature disrupts the efficiency of the service. *Desiderio v. Department of the Navy*, 4 MSPB 171 (1980). I find that the appellant's actions in this case clearly impaired the efficiency of the

service and warranted disciplinary action. I have also reviewed whether the appellant is entitled to have his removal mitigated to a lesser penalty in accordance with the Board's holding in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Therein the Board stated that in selecting penalties an agency must strike a "responsible balance with the tolerable limits of reasonableness." *Id.* at 333. Removal for prolonged absence has long been considered just cause for removal. Employee absence for which no foreseeable end is in sight is a burden which no employer can be expected to endure. *McKenzie v. U.S. Postal Service*, 1 MSPB 480 (1980). In the present case the appellant was AWOL for over two months and during this period gave no indication that he ever intended to return to work. I find that the agency's action of removing the appellant is reasonable for the proven misconduct.

DECISION

The agency's charge is sustained, the appellant has not established an affirmative defense, and the removal action is affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on January 2, 1984 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

ADMINISTRATIVE AND JUDICIAL REVIEW

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit

Systems Protection Board. An original and three copies of any petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date cited above.

The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations. The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1), as modified by Section 127 of the Federal Court Improvement Act of 1982 (to be codified at 28 U.S.C. Section 1295(a)(9)), the appellant has the right to seek judicial review of the Board's *final* decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be *received* by the court within 30 days of the *final* Board decision.

For the Board:

/s/ John H. Pleuss
John H. Pleuss
Presiding Official

[1]* UNITED STATES OF AMERICA
BEFORE THE
MERIT SYSTEMS PROTECTION BOARD

In the Matter of:

CHARLES PEEBLES,

v.

UNITED STATES POSTAL SERVICE,

Pursuant to notice, the above-entitled matter came on for hearing on the 25th day of July, 1983, at the Federal Building located in Chicago, Illinois, before JOHN H. PLEUSS, Presiding Official, Merit Systems Protection Board, 230 South Dearborn Street, Chicago, Illinois, 60604, commencing at 9:10 in the forenoon.

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* Numbers in brackets refer to the pages of the Transcript of Proceedings.

[2] APPEARANCES

JOHN H. PLEUSS, Presiding Official

GOLDMAN & MARCUS, 69 West Washington, Room 2252, Chicago, Illinois, 60602, by MR. ROBERT RILEY, appeared on behalf of the Appellant.

MS. PRISCILLA HENDRICKS, 433 West Van Buren, Room 306, Chicago, Illinois, 60607, appeared on behalf of the Agency.

* * *

PROCEEDINGS

* * *

[7] MR. RILEY: I believe that I don't have a copy with me although I think it's been put in the mail.

THE PRESIDING OFFICIAL: Okay.

MR. RILEY: —mailed to the Board.

THE PRESIDING OFFICIAL: So you're asking then that I reconsider my motion—your motion that this hearing be continued?

MR. RILEY: Yes.

THE PRESIDING OFFICIAL: Okay, do you have any arguments in support thereof since I don't have the written motion?

MR. RILEY: Mr. Peebles came to our office and was retained by us first on Friday afternoon which—Friday afternoon two or three days ago.

At that time we were informed that Mr. Peebles was seeking us to represent him at this hearing this morning and in order to prepare adequately for the hearing, we felt it was necessary to seek continuance for the Board and Miss Hendricks. If we could do it by agreement, Mr.

Peebles indicated that he was incapacitated throughout the period of time that he was to have prepared a defense and that because of that incapacitation he wasn't able to prepare his own defense.

Based on those representations to the [8] Board and to Miss Hendricks and to ourselves, we move that we be allowed to continue the hearing for a further date.

THE PRESIDING OFFICIAL: Ms. Hendricks?

MS. HENDRICKS: I object to that motion. I talked to Mr. Goldman Friday afternoon at which time he stated to me that he had been retained by Mr. Peebles Thursday evening. The Agency has made Mr. Peebles—sent the case file to Mr. Peebles the 20th of May in 1983, and we are ready to go forward with the case and we so wish that the Presiding Official would rule.

THE PRESIDING OFFICIAL: Okay, based on what's been presented to me, I find that the notice of this hearing was sent out on June 17th and that the Appellant has not established that he's been incapacitated since that time, so that your motion to reconsider my denial of your request for continuance is denied.

Now, concerning your motion to strike certain matter in the Agency file, and let's return to that. It's under Agency File two dash six, page five. Miss Hendricks, would you explain the date of this document and what period of time it covers?

MS. HENDRICKS: This document covers January the 21st through February the 18th, 1983. The

* * *

[14] witness doesn't influence the later testimony of another witness. There's no objection to this motion and I hereby grant the motion.

I'll remind all the witnesses then with the exception of the Appellant and the Agency's first witness that they'll

have to leave the room and wait elsewhere. Now, there is a witness room down the hall here, room 3294, and it's open. You can wait there. Furthermore, there's a cafeteria on the second floor. If you think it will be a long time before you testify, you could go down there, however, it will be more difficult to get in touch with you if you're down in the cafeteria, so I suggest that those witnesses who will have to wait, wait in the witness room down the hall, okay? At this time those witnesses are excused.

PEARLENE THOMPSON, called for examination herein by the Agency, after having been first duly sworn, was examined and testified as follows:

THE PRESIDING OFFICIAL: You may proceed, Ms. Hendricks.

Direct Examination

BY MS. HENDRICKS:

Q. Would you please state your name, title and work location, please.

A. Pearlene Thompson, supervisor mail. I work for the [15] main post office, 201, 8th floor, mail processing.

Q. Miss Thompson, what are some of your job responsibilities as a supervisor 201?

A. Some of the responsibilities—I'm a secondary supervisor which means that I am assigned to a particular unit. I have a leave group, and I'm in charge of leave granting, schedule—scheduling leave in advance and unscheduled leave, and Mr. Charles Peebles is one of my—one of the employees in my leave group.

Q. I call your attention to Agency Response File tab 2 through 6, page 2, which is a—notice of removal. Did you prepare that notice of removal?

MR. RILEY: I'm sorry. I don't seem to have the right areas. Two through six?

MS. HENDRICKS: Yeah.

THE PRESIDING OFFICIAL: Is this dated February 22nd entitled "Request for Removal"?

MS. HENDRICKS: Yes.

THE WITNESS: Yes, I did send a five-day letter to Mr. Peebles.

BY MS. HENDRICKS:

Q. Would you tell us did you receive a response from Mr. Peebles?

A. No, I did not receive a response from Mr. Peebles.

Q. Agency's Response File tab 7 through 10, page 7 is a

* * *

[18] my only point would be if there's another letter that Mr.—Mr. Peebles was to have responded to, I think that's what the testimony should involve not a letter that was directed to him personally, otherwise we don't really know what we're referring to when Mr. Thompson said he failed to respond. Failed to respond to what? If it's in the file, I think that's what we should be addressing ourselves to, not what's been marked 2-6.

THE PRESIDING OFFICIAL: Okay, your objection as far as admissibility of any document referred to or any testimony is overruled, however, it will be considered with regard to the weight to be attributed to the testimony. Miss Hendricks, is this five-day letter in the Agency file anywhere? It might clarify things if we could refer to it.

MS. HENDRICKS: Yes, it is.

THE PRESIDING OFFICIAL: Is it in the Agency files?

MS. HENDRICKS: It's not in the Agency Response File, but it is in the Agency file. We did not send it as part of the Response File but we do have a—

THE PRESIDING OFFICIAL: Were you intending to offer that as an exhibit?

MS. HENDRICKS: No, I was not.

[19] THE PRESIDING OFFICIAL: All right. After direct examination of this witness, we'll take a brief recess if you wish to examine that document and then you may wish to use it on cross-examination, all right? Okay, you may proceed, Miss Hendricks.

BY MS. HENDRICKS:

Q. Miss Thompson, at any time after March the 9th and prior to April the 15th, 1983, did you receive any documentation or any substantiation for Mr. Peebles' absence?

A. No.

Q. As a supervisor in charge of a leave group, what are your responsibilities if an employee has not substantiated his absence for a period of time?

A. As a supervisor with a leave group, it is a responsibility of the supervisor to—an unscheduled absence such as Mr. Peebles—to issue a five-day letter. With no response then it is the duty of the supervisor to request a removal of that employee.

Q. The period of absence—of time from January the 3rd until March the 9th, 1983, what was that leave charge to?

A. AWOL.

Q. And what is AWOL?

A. Absent without leave, without pay.

[20] Q. On—Were you aware that Mr. Peebles had substantiated—had sent in substantiation as far as his absence—that period of time was concerned to the Merit Systems Protection Board?

A. No, I wasn't.

MR. RILEY: Objection, timeframe. I don't know what time we're talking about.

THE PRESIDING OFFICIAL: Could you clarify what period of time you're talking about, please?

BY MS. HENDRICKS:

Q. January the 3rd through March the 9th, 1983.

MR. RILEY: The question was going to Miss—Ms. Thompson's awareness—what time was she aware that—I'm not certain what time the awareness is.

THE PRESIDING OFFICIAL: It doesn't matter. The question was—her answer was, no, she wasn't aware, so presumably she wasn't aware at any time.

BY MS. HENDRICKS:

Q. I show you the Appellant's appeal to the MS—to the Merit Systems Protection Board in which he submitted a medical statement from a Dr. Parris.

MS. HENDRICKS: I would like that

* * *

[24] documents which are not at this point admitted into evidence so, therefore, I think it would be inappropriate to ask that question until such documents are admitted, therefore, the objection's sustained.

MS. HENDRICKS: May I ask a question? Based on the witness that this—that can give testimony to this evidence will be late getting here, can I ask for a five-minute recess to make sure she gets here as soon as possible since I am going to have to talk it into evidence—the authenticity of it and how she arrived at it?

THE PRESIDING OFFICIAL: Do you have much more direct exam?

MS. HENDRICKS: As far as she's concerned, I'm through.

THE PRESIDING OFFICIAL: Okay, then let's take a five-minute recess at this time. Off the record.

(Off the record.)

(A recess was taken.)

Cross Examination

BY MR. RILEY:

Q. Ms. Thompson, are you acquainted with the employees and labor relations manual with respect to leave policy?

A. Yes.

* * *

[26] reflect what the rule with respect to supplying medical documentation to postal facilities and postal supervisors and tour superintendents such as yourself? Does that accurate reflect what the present policy is at the post office?

A. Yes.

Q. Okay. Now, does that indicate that a postal supervisor may accept evidence other than a signed statement by a physician as acceptable medical documentation for an employee's absences?

A. Pardon me. That he may accept—

Q. Yes.

A. —other statements?

Q. Yes.

A. It's possible.

Q. The rule itself uses the word "may", does it not?

A. Yes.

THE PRESIDING OFFICIAL: Do you wish to offer this document into evidence?

MR. RILEY: I will move that that document be allowed into evidence at this point.

MS. HENDRICKS: May I read the chapter that you pointed out to her—Which one is it? Three six four?

(Appellant's Exhibit 1 was marked for [27] identification.)

THE PRESIDING OFFICIAL: Okay, I marked this document as Appellant's Exhibit 1.

BY MR. RILEY:

Q. So that vests a certain amount of discretion up to you to accept certain medical documentation and not accept medical documentation?

A. I didn't hear the last part.

Q. It vests—Do you read that rule—do you interpret that rule to mean that it vests in you certain discretion to accept certain documentation as—as covering an employee's—or as adequate documentation covering an employee's absence? You can accept something other than medical documentation, is that correct?

A. Yes.

Q. What other types of things would you accept as adequate medical documentation?

MS. HENDRICKS: Object.

MR. RILEY: Okay, I withdraw the question.

BY MR. RILEY:

Q. Ms. Thompson, I'm going to show you what was given to me by Miss Hendricks—as a letter—a document—it's entitled, "A 5-day Letter", bears the date January 1982 in the upper right-hand corner.

[28] MR. RILEY: Mr. Pleuss, do you want to review this document before I show it to the witness?

THE PRESIDING OFFICIAL: Sure.

BY MR. RILEY:

Q. Ms. Thompson, do you recognize that type of letter or form of letter?

A. Yes.

Q. Now, that is known as a five-day letter or letter of intent in postal parlance, is that what they're referring to?

A. Yes.

Q. And do you send those out to all employees when you want additional medical documentation to cover their illnesses, periods of their illnesses?

A. This is sent out to all employees.

Q. If they're absent more than three days, you send out—

A. It's—It states what it is—a five-day letter, yes.

Q. Okay, You send those out—you are—You are a leave supervisor, is that correct?

A. Yes.

Q. If someone's absent more than three days, do you send them one of those letters requesting doc—medical documentation or some kind of documentation to substantiate their periods of absences?

A. Right.

[29] Q. Okay, and you do that with all employees, correct?

A. Right.

Q. And you don't instigate removal proceedings before you send them the five-day letter requesting medical documentation to cover the periods of absences? That's the first thing you do is send out the five-day letter, is that right?

A. That's correct.

Q. And then you wait for the response. If they don't respond, then you may take other disciplinary action, is that correct?

A. We do take other disciplinary action.

Q. Pursuant to that rule that I—that we read before, the 513.364?

A. Yes.

Q. Now. I'm going to ask you—this is a—it's a group of documents really—I'm going to ask you to flip to—the document before then. Now, this is a letter and it's been sealed. I would ask you to take a look at that letter and ask you if you know what that is—the envelope. I'm sorry—it's an envelope that's attached to the group of exhibits.

A. Yes.

Q. Okay, what is that envelope?

A. It's a certified envelope.

[30] Q. Are there markings in red that are stamped on the envelope?

A. Yes, there is.

Q. And do those markings indicate that the letter was certified but unclaimed?

A. Yes.

Q. Now, when a letter is unclaimed and sent certified, do you know what that indicates insofar as whether the—the letter that was contained in that envelope was ever received by Miss—by the person to whom it's addressed?

A. No.

Q. Does that letter—Do you think this letter—Strike that.

MR. RILEY: Mr. Pleuss, this letter has never been opened. I know this is kind of—a little bit like the Academy Awards. We don't even know what's inside the letter at this point. I request permission to open up this envelope at this time.

BY MR. RILEY:

Q. Is this letter opened at this point?

A. No, it's not.

Q. It has never been opened by anyone. Is this the letter that purports to contain a notice—a request for medical documentation within five days?

[31] A. Yes.

Q. So is it fair to say that Mr. Peebles never read the letter that's contained inside that envelope?

A. That's true.

Q. And there is pencil marking here, 1-27-83. Would that have been the date that this letter was returned to the postal facility?

A. Yes.

MR. RILEY: No further questions.

THE PRESIDING OFFICIAL: Did you wish to offer this into evidence, Appellant's Exhibit 1?

MR. RILEY: Yes, we would at this time.

THE PRESIDING OFFICIAL: Okay.

MR. RILEY: I believe it's Appellant's Exhibit 2.

THE PRESIDING OFFICIAL: Appellant's Exhibit 1 was the rules concerning leave. It was marked but never offered. Do you now offer this?

MR. RILEY: Yes, Mr. Pleuss.

THE PRESIDING OFFICIAL: Any objection?

MS. HENDRICKS: No objection.

THE PRESIDING OFFICIAL: The record will show that Appellant's Exhibit 1 is admitted in evidence.

(Appellant's Exhibit 1 was received

* * *

[34] knows the rules and regulations of substantiating absences?

A. Yes.

Q. You have no knowledge?

A. Yes.

Q. Would you answer that again, please.

A. Yes.

Q. He does have knowledge—I'm not understanding.

A. Oh, I have no knowledge of Mr. Peebles.

Q. Whether or not he understand that?

A. Right.

Q. You testified to Appellant's Exhibit 1 as far as medical documentation or other acceptable evidence. Has Mr. Peebles given you any medical documentation or other acceptable evidence to substantiate his absence for the period of time January the 3rd through March the 9th, 1983?

MR. RILEY: Objection, repetitious.

THE PRESIDING OFFICIAL: Overruled.

THE WITNESS: No.

BY MS. HENDRICKS:

Q. As far as postal procedures are and your—your rules and regulations in being a leave group supervisor, what period of time do you give an employee to substantiate his absence?

* * *

[42] Peebles was not in attendance at the postal facility from January 3 through March 9th, 1983.

THE PRESIDING OFFICIAL: Okay.

MR. RILEY: Therefore, this is being used to substantiate the fact that he was absent at that time can be repetitious. If it's used to demonstrate absences outside of that time, we would point out that it's irrelevant to the charges.

THE PRESIDING OFFICIAL: What do you say to this?

MS. HENDRICKS: I needed to show that with Miss Thompson being the leave supervisor what periods of time Mr. Peebles would have been sent a five-day letter. She gave testimony that she reviewed his records. These leave cards are part of his records which will reflect when he should have received five-day letters.

MR. RILEY: I would object on the grounds that the best rule evidence is if there are previous documents reflecting that, and Mr. Peebles was sent five-day notices and received them, that those be introduced into evidence rather than the witness be called to surmise as to what time he might have been sent records and might have received them.

The best evidence of that are the

* * *

[44] Q. To your knowledge, Ms. Thompson, has Mr. Peebles received—this is what I'm trying to establish, that he has received—okay. Miss Thompson, what do the postal rules and regulations governing when a—a veteran employee can be sent a letter of removal for being absent?

A. It's when he has been sent a letter—

Q. Pardon?

A. I didn't get all of that.

Q. Okay. What are the rules and regulations governing an employee who has been absent—an employee has been absent since a period of time and you want to—you have not heard from this employee and you want to send him a removal notice because he's not substantiating his absence, what are the rules and regulations governing the procedures for you to be able to send this employee removal notice?

A. If I haven't received any substantiation through the mail by someone from that employee, then I'm able to send him a removal notice after issuing him a five-day letter.

Q. Can you—according to postal policies and procedures sent an employee a notice of proposed removal—a notice of charges-removal without having first sent him a five-day letter?

[45] A. No, I cannot.

Q. Agency Response File, tab 7 through 10, the third paragraph states that the—that you sent the employee—

MR. RILEY: Objection. I'm sorry. What—I didn't hear.

MS. HENDRICKS: Seven through ten, third paragraph.

BY MS. HENDRICKS:

Q. As the result of that letter, did you receive anything from Mr. Peebles saying that he had not received a five-day letter from you?

A. No.

Q. Does that paragraph state that you have sent him a five-day letter?

A. Yes.

Q. That's page seven of Agency's Response File 7 through 10? To your knowledge have you had an occasion to talk to Mr. Peebles regarding his absences?

A. Yes.

Q. Would you state when and where, please.

A. In November of 1982—

MR. RILEY: Objection, relevance. Absences according to this period of time--in fact, it's before this period of time.

THE PRESIDING OFFICIAL: The question

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[47] anything, did he say to you regarding attendance?

A. I stated to him the leave program.

Q. Do you recall what he said to you?

A. He just listened.

Q. Did he make any comments?

A. No.

Q. Why was it necessary for you to state the leave program to him?

MR. RILEY: Objection as to why it was necessary to state the leave program. It's not relevant at this point. If she stated to him, he received it.

THE PRESIDING OFFICIAL: Sustained.

BY MS. HENDRICKS:

Q. Ms. Thompson, according to employee labor relations manual accepting medical documents or other substantiation, the Postmaster made a decision to remove Mr. Peebles on the 15th of April. Prior to the 15th of April, have you received any medical documentation or other substantiation for his absence of January the 3rd through March the 9th?

A. No.

Q. Based on Mr. Peebles' absence of January the 3rd through March the 9th without substantiating his absence, do you feel his removal will promote the efficiency of the [48] Postal Service?

A. Yes.

MS. HENDRICKS: We have no further questions.

THE PRESIDING OFFICIAL: Recross.

Recross Examination

BY MR. RILEY:

Q. Ms. Thompson, I'm going to direct your attention to what's been marked Appellant's Exhibit No. 2, Group Exhibit No. 2. Now, you've testified before that the pencil markings on here indicate that the letter was returned to the Postal Service on 1-27-83 unclaimed, is that correct?

A. Yes.

Q. Okay. Did you call Mr. Peebles on the telephone after you received that letter back as unclaimed?

A. No.

Q. Did anyone from the postal facility call Mr. Peebles after you—the postal facility received that letter back as unclaimed to inform Mr. Peebles of—between 1-27-83 and March 9th, 1983, did anyone from the post office call him and tell him that he was to supply further substantiation?

A. I wouldn't have any knowledge of it.

Q. Okay. As his supervisor, you do have his telephone [49] number or have access to his telephone number, is that correct?

A. Yes.

Q. And you were aware on or about 1-27-83 that that letter was—went unclaimed by Mr.—went unclaimed and was not delivered to Mr. Peebles, is that correct?

A. Yes.

Q. But you made no effort to pick up the telephone and give him a call and let him know about that letter, did you?

A. No.

MR. RILEY: If I might have one moment, I may be finished with the witness.

BY MR. RILEY:

Q. Ms. Thompson, would you require Mr. Peebles to substantiate absences with even one day with medical documentation?

A. Yes.

Q. The letter to refer to notice of charges dated March 19th, 1983—

MR. RILEY: I'm going to show you what's been contained in the Agency Appeal File, Mr. Pleuss. Would you rather—Do you want to show the witness your copy of it or—she has a copy.

BY MR. RILEY:

[50] Q. Agency Appeal File 7 through 10, page 10. Now, that's a photograph of the March 9th, 1983 letter, is that correct? I'm sorry. Strike that.—a photocopy of the envelope upon—in which the March 9th, 1983 letter was placed, is that correct?

A. Yes.

Q. Okay, and that letter—the markings on the outside of that envelope indicate that the letter was unclaimed, is that correct?

A. Yes.

Q. The rules require that you sent the—Strike that. Now, you received this letter back from the postal office before you—before April of—

THE PRESIDING OFFICIAL: Off the record a minute.

(There was discussion off the record.)

BY MR. RILEY:

Q. Ms. Thompson, that envelope that's been marked or contained in the Agency Appeal File 7-10, document

No. 10 also indicates that that notice of charges went unclaimed as well, is that correct?

A. Yes.

Q. And you received that back at the post office before the char—the letter of decision dated March the 25th, 1983, is that correct? In other words, the post office

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[52] not sure it's been established that she knew. Why don't you pursue that line of questioning?

BY MR. RILEY:

Q. Ms. Thompson, did you know that the letter had not been received by Mr. Peebles as of—before the letter of decision was written?

A. No.

Q. Did you make any attempt to find out whether or not the letter had been delivered?

A. Yes.

Q. And you couldn't determine whether or not that particular letter—the one that's contained inside the envelope stamped unclaimed at the Agency Appeal File 7-10, No. 10, you were unable to determine whether or not the letter had been delivered or that envelope had been delivered?

A. This particular envelope?

Q. That envelope.

A. No.

Q. Did you attempt to call Mr. Peebles before March 25th, 1983 to inform him of the contents—personally inform him of the contents of the letter?

A. No.

Q. Do you know whether anyone from the post office did that?

* * *

[54] period of time would she be given to deem this documentation?

MR. RILEY: I'm simply assuming that it would be acceptable regardless of the period of time.

THE PRESIDING OFFICIAL: The objection is overruled.

BY MR. RILEY:

Q. Assuming that the documentation is deemed adequate, would the employee be subject to removal or discipline for failure to maintain a regular schedule or regular attendance?

A. You're saying that if he was absent for—a length of time?

Q. But he or she provides adequate medical documentation just for a length of time.

A. Yes. That's kind of difficult to answer.

Q. Ms. Thompson, isn't it true that an employee can be absent for a period of approximately—the dates January through March 9th, whatever period of time that covers, supply the adequate medical documentation and that they would not be removed for failure to be regular in attendance and if they provided adequate medical documentation?

A. Yes.

[55] Q. So it's not the length of time that's in issue in Mr. Peebles' case but rather the documentation that he provided the post office, is that correct?

A. Yes.

Q. That—if an individual fails to provide adequate medical documentation as opposed to being in regular attendance—Strike that. Miss Thompson, assume an employee is absent perhaps, let's say, eighty percent of the time but provides medical documentation for their absences. Assume further a—or are you—Is it the post office's policy to remove charges or remove employees in that case based on failure to maintain regular attendance?

MS. HENDRICKS: Object. Mr. Pleuss, I am not understanding the relevancy of these—these questions with the

assumptions. She has testified that the documentation would be received and approved for a period of time if the employee substantiated it, so why are we relating the—failure to maintain that—I'm not understanding the questions.

MR. RILEY: I believe I can tie this up in two questions. Secondly, I would simply point out that my questions are going to the charges as stated in the notice of proposed removal and with respect to the sections that were cited in that notice [56] of proposed removal for the charges.

THE PRESIDING OFFICIAL: You've already established that if substantiation had been provided that they would not have initiated removal. What further are you going for?

MR. RILEY: I hate—The charges indicate a specific section that is violated, and I would like to ask a couple of questions with regards to that specific section.

THE PRESIDING OFFICIAL: All right. Objections overruled. Why don't you restate your question.

BY MR. RILEY:

Q. Employees who are—even if they provide adequate medical documentation who are chronically not there or in attendance are charged with failure to maintain attendance requirements as set on the 666.81, is that correct, Ms. Thompson?

A. Yes.

Q. Employees who are absent who fail to provide adequate medical documentation would be charged with absence without permission because they failed to furnish satisfactory evidence of their absence under eight—under 666.82, is that correct?

A. Repeat that again.

[57] Q. An employee who fails to report to duty and doesn't substantiate it either with evidence of emergency

or evidence of an illness would be removed or would be given charges pursuant to 513.365, is that correct?

THE PRESIDING OFFICIAL: Can you explain these numbers you're throwing into the record?

MR. RILEY: I'm sorry. I'm—Strike that. If I can be allowed to back up and go over—

THE PRESIDING OFFICIAL: Are you quoting from the employee and labor relations manual?

MR. RILEY: Yes, I am.

BY MR. RILEY:

Q. I'm going to show you what's already been marked Appellant's Exhibit No. 1, and I'm going to ask you to read what's indicated as 513.365 and it's entitled, "Failure to Furnish Required Documentation with Respect to Medical Documentation or Other Acceptable Evidence." That would be down there. Have you read that, Ms. Thompson?

A. Yes.

Q. And is it your intention that that section three—513.365 allows you to initiate disciplinary proceedings against an employee quote, "If acceptable proof of incapacitation is not furnished, the absence may be charged to annual leave, LWOP or AWOL." Is that the [58] section that empowers you or the deciding officials to initiate charges if adequate or acceptable medical documentation isn't provided?

A. Right.

Q. If an employee on the other hand doesn't attend regularly, you know, as we cited—as—Strike that. If an employee is absent eighty percent of the time but still provides adequate medical documentation, they may still be removed pursuant to the section you cited before, 666.8 requirement for attendance, is that correct?

A. Yes.

Q. Isn't it true then—I'm going to direct your attention to Agency Appeal File 7-10, page 10—on page 7, and I'm going to direct your attention to what's under paragraph four. Isn't it true then, Ms. Thompson, that the charges or that paragraph would more properly have cited Section 513.365 as opposed to 666.81 as is cited in there? Would it—wouldn't the other one, the—

MS. HENDRICKS: Objection.

BY MR. RILEY:

Q. Wouldn't the—

THE PRESIDING OFFICIAL: What grounds?

MS. HENDRICKS: He's asking for an opinion. It was—I think she identified herself as [59] the supervisor of mails not a writer of letters or—

MR. RILEY: Mr. Pleuss, she's an expert on leave.

MS. HENDRICKS: She's a pardon?

MR. RILEY: She's an expert on leaves. I believe the post office established that before she'd be allowed to testify.

THE PRESIDING OFFICIAL: I'll overrule the objection. You may proceed.

BY MR. RILEY:

Q. Wouldn't it be more properly—proper—wouldn't it have been more properly cited 513.365 as opposed to 666.18 which deals with regular—or .81 which deals with regular attendance as opposed to failure to substantiate a medical or illness, isn't that correct?

A. No.

Q. This particular section—Just so you understand the question, 513.365 deals specifically with failure to furnish medical documentation?

A. Oh, yes, uh-huh.

Q. So wouldn't that be more appropriate to charge Mr. Peebles with that as opposed to failing to be regular in attendance?

A. Yes.

MR. RILEY: No further questions.

* * *

[61] File tabs 2 through 6. Would you look at the documents within those tabs, please. It contains 3971's covering the period of time January the 2nd at 10 o'clock through—we'll say March the 9th, 1983 at 6 o'clock. Are those 3971's approved or disapproved?

A. They are disapproved.

Q. What does that mean as far as the period of time Mr. Peebles was charged with being absent since January the 3rd through March the 9th? What does that—

MR. RILEY: I'm going to object because what Mr. Peebles is charged with is contained in Agency Appeal File 7-10, page 7.

THE PRESIDING OFFICIAL: Overruled.

BY MS. HENDRICKS:

Q. The 3971's documented in that period of time, what do they stipulate that period of time to be charged to, please?

A. Mr. Peebles is charged with being AWOL.

Q. For what period of time, please?

A. From January the 3rd to March the 9th.

Q. Miss Thompson, as a leave—

A. I'm sorry. That's up to—

MR. RILEY: Objection.

THE WITNESS: —March the 18th.

MR. RILEY: Objection. The question is

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[65] that question.

BY MS. HENDRICKS:

Q. Agency Response File tabs 7 through 10, page 10, is the notice of charges-removal. Did you write this letter?

A. Yes.

Q. Did you write it from your office—by writing now I mean did you physically write it?

A. Yes. Page 10?

Q. Yeah, I'm sorry. Page 7—page 7. Did you write that letter?

A. This particular letter, yeah. I requested a removal.

Q. After requesting a removal, what, if anything, is done with your request?

A. It is given to my superiors.

Q. To your knowledge what, if anything, is—do they do with it?

A. It goes to my tour superintendent who takes and makes a decision based on many facts other than my own of whether to issue this letter to that employee.

Q. The department—Is there a department in the post office entitled—with the title of employee—

MR. RILEY: Objection, leading.

THE PRESIDING OFFICIAL: Overruled.

BY MS. HENDRICKS:

Q. —entitled employee labor relations?

[66] A. Yes.

Q. To your knowledge what does employee and labor relations do?

A. Employee and labor relations will make the decision on whether to issue a removal on Mr. Peebles or any other employee. They have the last say-so.

Q. What—How do they get the say-so? How were they made aware that some action needs to be taken on an employee?

MR. RILEY: Objection, relevance. Also—also it's speculative because we're talking about how they'd make decisions. They're not here. We don't know what their machinations were here in this particular instance.

THE PRESIDING OFFICIAL: Can you indicate where you're leading with this?

MS. HENDRICKS: Yes, okay.

BY MS. HENDRICKS:

Q. Calling your attention to the top part of this letter.

THE PRESIDING OFFICIAL: Are you withdrawing your previous question?

MS. HENDRICKS: That's right. I didn't answer your question. Where I'm going with this is that the representatives—the Appellant's representative made note of the fact that the Appellant did not

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[68] don't you restate your question?

BY MS. HENDRICKS:

Q. Okay. Miss Thompson, in reviewing page 7 of Agency's Response File 7 through 10, how was this letter sent out?

A. From employees labor relation.

Q. In addition was it sent out certified and ordinary and to the pay location?

A. Yes.

Q. To your knowledge was the ordinary letter returned?

MR. RILEY: Objection, would she have any knowledge?

THE PRESIDING OFFICIAL: Overruled. The question is to her knowledge.

BY MS. HENDRICKS:

Q. To your knowledge was the ordinary letter returned?

A. To my knowledge, no.

Q. If it was not returned, would it be reasonable to assume that it was delivered?

MR. RILEY: Objection, calls for an assumption.

THE PRESIDING OFFICIAL: Sustained.

BY MS. HENDRICKS:

Q. Page 10 of the Agency Response File, the certified letter is marked unclaimed, is that correct?

[69] A. Yes.

Q. Okay. In review of the Agency Response File, do you see an ordinary letter that has been returned marked unclaimed?

MR. RILEY: Objection. We have what we have in here.

THE PRESIDING OFFICIAL: Overruled.

THE WITNESS: No.

BY MS. HENDRICKS:

Q. I call your attention to Agency Response File tab No. 11. Were you aware—When this decision letter was sent to Mr. Peebles, were you aware of that?

A. Yes.

Q. How were you aware of that?

A. I was made aware of that through employees labor relations.

Q. Does it signify at the bottom that Mr. Peebles received that decision letter?

MR. RILEY: Objection.

THE WITNESS: Yes, by his signature.

MR. RILEY: Objection. The document speaks for itself.

THE PRESIDING OFFICIAL: Overruled. You may answer the question.

THE WITNESS: Yes, his signature. He

* * *

[74] and says he's going to be absent more than three days he instructed he doesn't have to call in every day after that, isn't that correct? You don't have to telephone the facility every day to inform them that you're not coming to work?

A. You have to call in for a particular leave, indefinite sick leave.

Q. But if he was given indefinite sick leave at that time, if he's going to be absent more than three days, they go—employees go on indefinite sick leave at that time, isn't that correct?

A. He wouldn't have to call in every day, no.

MR. RILEY: Okay, no further questions. I'm sorry. May I take one minute just to look at my notes and make sure there's nothing I've missed at this time?

THE PRESIDING OFFICIAL: Mm-hmm. I've got some questions for the witness.

MS. HENDRICKS: Before you, I'd like to have one more when he's done.

THE PRESIDING OFFICIAL: All right, go ahead.

MR. RILEY: No further questions at this time.

THE PRESIDING OFFICIAL: Redirect.

* * *

[77] facility inform Mr. Peebles that upon his return he was to provide medical documentation, is that correct? Someone already told him that on the phone?

A. I'm sorry. It's just "must substantiate."

Q. I'm sorry. Can you keep on—There are words past the words "substantiate", is that correct, and don't those words say, ". . . upon return"?

A. Yes.

Q. So they do say to be substantiated upon return?

A. Mm-hmm.

MR. RILEY: No further questions.

THE PRESIDING OFFICIAL: Okay, thank you very much. You may be excused.

THE WITNESS: Thank you.

THE PRESIDING OFFICIAL: Are you ready to call your next witness?

MS. HENDRICKS: The Agency is waiting on Miss Stang.

MR. RILEY: May I go off the record for a moment?

THE PRESIDING OFFICIAL: Yes. Off the record.

(There was discussion off the record.)

THE PRESIDING OFFICIAL: Ms. Hendricks, would you call your next witness?

[78] DOROTHY STANG, called for examination herein by the Agency, after having been first duly sworn was examined and testified as follows:

Direct Examination

BY MS. HENDRICKS:

Q. Would you state your name, title and place of employment, please.

A. Yes, my name is Mrs. Dorothy Stang, s-t for Tom a-n-g, district administrative coordinator, and I work for the Postmaster for the United States Postal Service.

Q. Ms. Stang, what is some of your job responsibilities as a district coordinator?

A. Postmaster is custodian of all records, and I am his personal representative in court to attest to same on subpoena served on him.

Q. I call your attention to what has been marked as Agency Exhibit 2. Would you tell us what that is, please?

A. That's one of our—what we refer to as court orders that we issue to various stations when a party becomes deceased. When a party becomes deceased, they notify me at my office. That is one of my additional duties.

* * *

[80] MR. RILEY: Okay, I'm a bit confused. Is Agency Exhibit 2 two pages?

THE PRESIDING OFFICIAL: No, the first page is labeled Agency Exhibit 1, and the second page is labeled Agency Exhibit 2, and we're dealing with Agency Exhibit 2 at this point.

MR. RILEY: Objection, foundation. I'm not certain I understand the—who sent this out, at what time or when or what the significance of it is.

THE PRESIDING OFFICIAL: Okay, the objection is overruled. The Agency Exhibit 2 is admitted into evidence.

(Agency Exhibit 2 was received into evidence for the record.)

BY MS. HENDRICKS:

Q. Miss Stang, did you send this Agency Exhibit 2 out?

A. I certainly did.

Q. Could you tell us what perpetrated you to send this out—Agency Exhibit 2?

A. Because we were—it was reported and verified that Dr. Parris is—I'm sorry—Douglas Parris is deceased and it is part of my duty to—when I determine that the evidence that they submit is sufficient to warrant the forwarding of the mail, I issue this order to the local station which in this case is South Chicago [81] which is up here in the upper left-hand corner and it would—what it means is that this is instructing the South Chicago Post Office to forward all mail addressed to Douglas Parris at 8325 Stony Island to the Exchange National Bank of Chicago who has been appointed by the court with letters of office as executor of his estate.

Q. I call your attention to Agency Exhibit 1. Have you seen that document before?

A. Yes, I have the original.

Q. Could you tell us how you came to get that—the original?

A. Yes, I did. Inasmuch as our retention period for records such as this particular Exhibit B is two years. We had to—

THE PRESIDING OFFICIAL: You're referring to Exhibit 2?

MS. HENDRICKS: Yes.

THE WITNESS: Yes, this one here, the court order.

THE PRESIDING OFFICIAL: Agency Exhibit 2?

MR. RILEY: Okay, is the other document marked?

THE PRESIDING OFFICIAL: Yes, the other one is marked as Agency Exhibit 1.

[82] THE WITNESS: Okay. The retention period is two years, and when I was first subpoenaed, I recall the name Douglas Parris because another one of my many duties is to investigate medical certificates, and I've been out to his office many times, and I remember a deceased case on it, so we had destroyed this and in order to comply with your subpoena and to prove the fact that he was deceased, the only recourse I had was to go to the Exchange National Bank and in their file they still had the original certificate of death which they sent to me.

BY MS. HENDRICKS:

Q. Is Agency Exhibit 1 a copy of that original certificate?

A. Yes, it is.

Q. Does it state that—What is the date of death on the certificate?

MR. RILEY: Objection.

THE WITNESS: They have the—

MR. RILEY: States—

THE WITNESS: It shows right on the top August the 10th of 1980, and the burial August 16.

MR. RILEY: Objection, it states—It speaks for itself.

THE WITNESS: Right.

* * *

[84] MR. RILEY: I would object because it calls for conclusion, and it's up to the Board to decide what's true and accurate and not for the—not for Miss Stang.

BY MS. HENDRICKS:

Q. Miss Stang, you testified earlier that you have had an occasion to go out to Dr. Parris' office, is that correct?

A. Yes, ma'am.

Q. On those occasions, did you have an opportunity to see anything with his signature on it?

A. Yes, very many times.

Q. Does that resemble the—the signature of Dr. Parris?

A. It resembles the way he normally would sign it or stamp it. It could be—you know, it resembles it, and I recognized the name immediately when I saw it as—and I knew it—knew it wasn't correct because of the date of death.

Q. The date—the date on that document is what?

A. April 27, '83.

Q. And you just testified that it cannot be correct?

A. No, not unless somebody, you know, put his name—whoever put his name there.

Q. Did you have an occasion to talk to Dr. Parris' wife?

* * *

[87] A. You mean like at the office there?

Q. Yes.

A. Many times the nurses used a stamp—in fact, a similar stamp. Sometimes they would sign his name with his authorization, but we would check them out to make sure they were authenticated with the record.

Q. Were you able to determine that after dec—after August 10th, 1980, that these nurses were still giving out medical statements?

A. I cannot say that, no.

Q. To your knowledge is the doctor's office at 8325 South Stony still in—still being used?

A. I—to the best of my knowledge, I believe it is being used but not under his name.

Q. Not under his name. To your knowledge is—is anyone authorized to issue out doctor statements with his name—in his name?

A. Dr. Parris?

Q. Yes.

A. I don't know. I didn't pursue it any further. Once I had the subpoena, I knew he was deceased and couldn't—this couldn't be authentic.

* * *

[89] DOROTHY JOHNSON, called for examination herein by the Appellant, after having been first duly sworn, was examined and testified as follows:

Direct Examination

* * *

BY MR. RILEY:

[91] Q. And what's your address? Where do you live now?

A. 10242 South Morgan.

Q. Does anyone live with you?

A. Charles.

Q. Charles. Is that the Appellant in this case, Charles Peebles?

A. Yes, Charles Peebles.

Q. Okay, and does Mr. Peebles have any relation to you?

A. I'm his mother.

Q. And Mr. Peebles is your son?

A. Right.

Q. Okay, on or about January 3, 1983 did you become aware of any change in Mr. Peebles' behavior or personality?

A. Yeah.

Q. What change did you notice on or about January 3?

A. I noticed that he was very nervous, very nervous.

Q. Okay. When you say "very nervous", were there any kind of phys—do you recall any physical manifestations that he exhibited?

A. Yes, how he was doing, he was sweating, you know, a lot of sweat was coming down on him, and he was just wringing his hands, and he would just—he was just scared. He was scared to go through the house, he wouldn't even go [92] upstairs.

Q. What kind of house do you have at that address?

A. I have just a bungalow house, but I have upstairs—and he was—he's scared to go—he was scared to go upstairs.

Q. Mr. Peebles was afraid to go—

A. Yes.

Q. —upstairs?

A. Yes, and wouldn't go outside unless I would be with him or someone.

Q. Did you have to make any other kind of accommodations for Mr. Peebles' behavior at that time?

A. Well—

Q. Did you have to take any special steps because of the way he was acting?

A. Well, I did—we did go to the doctor, and I told the doctor how nervous he was.

Q. Okay, both of you went to the doctor?

A. Mm-hmm, told me how nervous he was.

Q. Was that Dr. Lynde (phonetically)?

A. Yeah, the one on—79th or 95th Street.

Q. Now, did you place a telephone call to the facility—the postal facility to notify them of Mr. Peebles' absence?

A. Yes, I did.

[93] Q. Did you do that on or around February 1983?

A. Yes, I did.

Q. Did you call more than one day?

A. I called four nights.

Q. And what did you tell the person who answered the phone at the postal facility?

A. I told them that—that Charles Peebles—I was calling her for Charles Peebles and he was sick, and on the fourth night when I called, she told me that I didn't have to call anymore because they would make a record that he is definitely sick and when he come in, bring a doctor's slip.

Q. They didn't ask him to bring in any kind of medical documentation before he came in, is that correct?

A. No, uh-uh.

Q. Do you know whether Mr. Peebles was under medical—was he receiving any—any drugs or pharmaceuticals for his nervousness?

A. Yeah, he was taking some—he was taking pills—I mean blood pressure pills and—and some nervous pills.

Q. Now, did you notice a change in Mr. Peebles' behavior from January 3, 1983 through March 9th, 1983? In other words, did he improve or get worse with respect to his—

A. He didn't get no better.

* * *

[97] Q. Do you think he was capable of going out at that point and—and was he sufficiently aware that he could have—Strike that. Are you aware of any letters of intent or five-day notices that were sent to the home at that time?

A. No.

Q. Okay. Did Mr. Peebles tell you he had ever received any of those?

A. I didn't hear him say that he received any because I didn't receive any either. I didn't see any.

Q. Would you have known if a five-day notice arrived at the house?

A. Yes, if it would have come there, I probably would have seen it, yeah.

Q. Certified or ordinary mail?

A. Right.

Q. Did—Do you know whether Mr. Peebles received a notice of charges dated May 9th, 1983? Were you aware of the document arriving at the house?

A. Mm-mm.

Q. Did Mr. Peebles tell you that he had ever received that document?

A. Mm-mm.

Q. I'm sorry. You have to articulate the answer for the court reporter. She can't take down nods. You have to

* * *

[100] I guess, and then I would go to the doctor with him on 95th Street.

Q. Did you—when you—Did you go to the doctor with Mr. Peebles?

A. Yes, I did.

Q. Did you have an occasion to ask the doctor for a certificate of work for Mr. Peebles, you know, to show that he had been to the doctor?

A. Well, I had had some—I went back and exchanged them when he wasn't doing any good and wasn't able to go back to work, and I went to have some exchanged myself.

Q. Some what exchanged?

A. Some—certificates.

Q. What was the certificates for?

A. For work, but he wasn't able to go back to work.

Q. Did you mail them off to work? Did you send them to his place of employment?

A. No, I did not, but I—he did I guess. I don't know. I know I didn't.

Q. You just went back to get them?

A. Yeah, right, picked them up.

Q. At any time did the doctor you were taking him to tell you that he was—that Mr. Peebles was not able to go to work?

A. That doctor on 95th Street. I know he told me once [101] that he wasn't able to go to work. He was real nervous. He told me that, and I said, "Yes, he sure is."

Q. To what—Did he state a period of time that he would be able to go to work?

A. No.

Q. He just said—Did he give you a note to that effect?

A. I—no, he didn't. I was just talking to him, you know.

Q. It would have been—Approximately when was this that you took him?

A. That was in—now, I don't know exactly what month it was and what date. I really can't tell. I can't recall.

Q. This year?

A. Oh, yeah, it was in this year all right.

Q. Was it the beginning of the year?

A. It probably must have been around in February or March.

Q. February or March?

A. Uh-huh.

Q. When you called the job for Mr. Peebles, at any time did anyone tell you to—that Mr. Peebles would have to substantiate his absence?

A. No.

Q. No?

A. Only thing—she told me this, when he'd be able to

* * *

[107] Q. Did this doctor have a foreign-sounding name, do you remember?

A. I can't remember.

Q. Did you see the doctor?

A. Yes, I did. I seen the doctor.

Q. Okay, and do you remember when it was that you saw him?

A. No.

Q. Did you ever see any other doctor besides this one by 96th and Halsted?

A. No, I think that's the only one I really seen, but I know he had been to some other doctor.

Q. And what did he go—what was the reason he went to the doctor when you were with him?

A. About his blood pressure and he had a rash and his nerves.

Q. I see. Did you ever see a Doctor Douglas Parris with your son? He's on Stony Island Avenue about 8300.

A. No, I don't think I went to that one.

THE PRESIDING OFFICIAL: Okay, no further questions at this time.

Redirect Examination

BY MR. RILEY:

Q. I'm going to show you what I believe is already in the file. It's a—purports to be a certificate for return to school or work for Mr. Charles Peebles by a

* * *

[110] really can't tell.

Q. But you did see the doctor fill it out?

A. Yes.

Q. And it was this statement?

A. Yeah, I guess it was that statement.

Q. The doctor filled out—signed the nurse's name up under the date?

A. No, it was a nurse that—I think that's the one—I think that's the one I had to have rechanged because he wasn't able—he had given him a slip, and he wasn't able to come back to work, and I had to have that in exchange because I—he told—he called the doctor and told him that he wasn't doing any good, and the doctor said, "Well, I'll give you another slip." and I think that's the one. I think.

Now, I ain't going to say for sure, but it was a lady that gave it to me, a nurse.

Q. On what date did you talk to the doctor, the 3rd or—or the 15th of January?

A. I think it was on the 3rd. I think it was. I think.

Q. And when did you go back to get a new statement?

A. Around about the—I don't know. About three or four days later I think. I think it was three or four days later. I don't know. I can't say for sure.

Q. Now, after the doctor said that Mr. Peebles was not [111] doing any better because of his blood pressure and—

A. Blood pressure, nerve and—high blood pressure and nerves.

Q. Around the 19th of January was he—was he feeling any better?

A. No, no, no.

Q. No. Did he get a doctor's statement for the 19th?

A. No, uh-uh.

Q. What did you do?

A. Yes, I think that's when he filled it out for the 19th, but he wasn't doing any better, not no better.

Q. What doctor filled it out?

A. The one on 95th Street.

Q. On 95th Street.

A. That's right.

Q. Is that when you took it back to have it re—exchanged for the 19th of January?

A. Yeah, I had taken it back there. I know I had taken it back there on 96th Street, the doctor down there, but he was not getting better.

Q. What about in February?

A. No.

Q. Was he—

A. No.

Q. Did you take him to a doctor in February?

[112] A. I would—I had some medicine of my own, some nerve pills of my own, and I give him the nerve pills because we had ran out of money going back and forth to the doctor, but I had some.

Q. What about in March?

A. No, he still wasn't no better.

Q. Did you take him to the doctor in March?

A. No, because I didn't have the money right then.

Q. Was he taking medication in March?

A. Yeah, he was taking blood pressure pills and—and nerve pills—them nerve pills. He really was.

Q. What about in April—

A. Yeah, he—

MR. RILEY: Objection. Objection.

THE PRESIDING OFFICIAL: Yes? Basis?

MR. RILEY: The charges only go through March 9th, 1983. His absences in April are really no issue in this case.

THE PRESIDING OFFICIAL: Do you withdraw that question?

MS. HENDRICKS: Yes, I do.

BY MS. HENDRICKS:

Q. Miss Johnson, were you aware that your son went to a doctor in April to get a medical statement?

MR. RILEY: Objection, she's already

* * *

[114] A. Well, I don't know every—every trip that he went. He could have went to the doctor and I not knowing about it on the 27th of April. I can't remember way back then.

Q. There—Were there times when he would go to the doctor and you not be aware of it?

MR. RILEY: Objection. If she's not aware of him going to the doctor, she wouldn't be aware of him going to the doctor.

THE PRESIDING OFFICIAL: No, overruled. Please restate the question.

BY MS. HENDRICKS:

Q. Miss Johnson, would there be times that your son would go to the doctor without your knowledge?

A. No, I guess not because if I didn't go, Roberta would go with him.

Q. So—

A. Now, he could have went to the doctor and, you know, and not—not telling me about it—told me about it, but Roberta would go with him because he would be scared to go by himself. He wouldn't go by himself.

MS. HENDRICKS: No further questions.

THE PRESIDING OFFICIAL: Redirect?

MR. RILEY: No further questions.

* * *

[121] from today, and then the opposing counsel will have a week from next Monday to respond to any new evidence.

MR. RILEY: Mr. Pleuss, date of service as of date of mailing?

THE PRESIDING OFFICIAL: Right.

MS. HENDRICKS: I missed that.

MR. RILEY: Date of service as of the date of mailing.

MS. HENDRICKS: Okay.

THE PRESIDING OFFICIAL: Okay, parties having now rested and there being no further administrative details, I'll now turn to the parties for their closing statements. Miss Hendricks, are you ready?

MS. HENDRICKS: Yes, Your Honor, we maintain that the proposal of removal for Mr. Peebles was for just cause and warranted because he has not reported for duty with any regularity. We know now that he submitted fraudulent medical statements for prior absences. He has been submitting these fraudulent medical absences since 1971.

On March the 24th, 1981 he filed an appeal with the Merit System Protection Board—

MR. RILEY: I'm going to object to any—I know generally—objections are not had on closing statements, but at this point any reference to what [122] happened in a prior possible proceeding is not in evidence and it's not relevant to the present case.

THE PRESIDING OFFICIAL: Okay, it—it may not, in fact, be relevant or in evidence, but I don't entertain objections on closing statements, but you will have a chance to make your own closing statement, so the objection is overruled.

MS. HENDRICKS: On March the 24th, 1981 the Appellant filed an appeal with the Merit System Protection Board because the Agency had proposed a removal action for him because he had been absent since.

With his appeal he submitted another medical statement from Dr. Parris dated March the 21st, 1981 to substantiate his absence. As the result of that substantiation, the Agency notified the Board and the Appellant that they would rescind the removal action and which they did. As a result of the rescinding action, the Board dismissed his appeal.

We're here again today because he has substantiated his absence with another medical statement from a doctor that died in 1980. We now know that since—from 1981, 1982 and 1983 the Appellant has been submitting fraudulent medical statements from a doctor who was killed in a traffic accident in 1980.

The Postal Service or any other [123] business can't operate efficiency—efficiently with an employee that only reports for work a total of a few months in a five-year period.

Then to substantiate his absences, submit fraudulent statements to cover that absence. It would be most unreasonable to expect this practice to continue and any discipline less than removal could not be considered as corrective. The Appellant knows the rules and regulations

for substantiating his absence. He has been absent on many occasions as I've just stated, and each time he waits until he gets a removal notice and then files an appeal with a fraudulent statement. Each time the Agency has rescinded that statement—the removal notice.

He's present here today, yet he does not get on the stand under oath to testify as to why. We have this document to substantiate part of his absence. If you will notice, the medical statements that he submitted neither state that he was totally incapacitated for duty—a skin rash—be able to return on the 19th, and then on the 19th he gets another statement or he types another statement saying he's not able to work until a date that's past the decision date. It's been said here that there is no evidence that he has received any of these notices. [124] It is always—it has been presumed that mail that has not been returned had been delivered.

The Postal Service has always sent out letters certified and ordinary. Mr. Peebles received his notice of removal, and he received it on the 10th of May—10th of March. It has not returned back to the Postal Service.

In light of this—in light of the record evidence, testimony here today, we submit that in order to maintain the efficiency of the service, the Appellant's removal is warranted. Thank you.

THE PRESIDING OFFICIAL: Mr. Riley?

MR. RILEY: Thank you, Mr. Pleuss. Initially I'd like to address myself to a couple comments that have been made by Miss Hendricks. Firstly, Miss Hendricks offered a recitation of allegations that are contained no where in evidence. The Attorney Registration and Rules of Ethics indicate that an individual only introduce or make statements in closing argument which they know has some reasonable basis in the record—none of those statements do.

Also, the Attorneys Registration Commission indicates that the canon of ethics which is to be followed—an indi-

vidual should not submit evidence or make closing statements when there's no [125] evidence in the record, and that's been done all—quite consistently in closing statements with reference to other exhibits, failure to document them if they're part of the charges and should have been part of the charges.

It's highly prejudicial, and it has no place in the closing argument, and at this point I'm just appalled that someone would go ahead and make statements like that when they made no effort at all to put them in the record. I think it's highly prejudicial and totally out of place, and while the Rules of Evidence aren't strictly followed, we do have—the Board requires evidence, and to start arguing something that's clearly not in evidence, not even remotely, I think is—is an affront not only to the Board but—not only to the Appellant but to the Board as well.

Secondly, I would like to direct the Board's attention to the fact that Mr. Peebles was charged with violation of labor relations rule 666.81. That's what the charges state—"You have failed to maintain the attendance requirements of your position." We've heard testimony from the Agency's own witnesses that those attendance requirements involve being absent large amounts of time and not involve medical documentation as this case does.

* * *

[129] medical documentation.

Since they've charged him with one thing—the Agency's charged him with one count and removed him on another, we would hold that the Agency's action is void and feel Mr. Peebles should be reinstated with full backpay. The fact Mr.—no further—I have nothing further.

THE PRESIDING OFFICIAL: Okay, thank you. I'd like to just observe that arguments—closing arguments with counsel are not evidence and will not be considered as such in my decision and, furthermore, argument relating—

that doesn't relate to the evidence I find is not persuasive and will not be presented.

I was disturbed that part of the Agency representative's comments pertained to information which was not entered into evidence and to the extent that the Agency representative is not an attorney, I want to advise her at this time that any time you make a closing statement or closing argument, that argument should relate to the evidence that's at file and the law that's applicable to that evidence, and it should not refer to things that have not been offered into evidence.

MS. HENDRICKS: Okay, may I ask a question?

[130] THE PRESIDING OFFICIAL: Certainly.

MS. HENDRICKS: Okay, that can be part of the record if he so desires, you know. This is what—I'm totally—

THE PRESIDING OFFICIAL: I thought you were going to ask me a question.

MS. HENDRICKS: Yeah. Could it—How can you get it into evidence if—there's only one way—

THE PRESIDING OFFICIAL: The only way to get it into evidence is to try to elicit it from a witness, and if it's objected to and not admitted, then it's not to be considered, and you're not to raise it in closing argument, okay?

You can't use closing argument as a back door to get in things that are omitted during the hearing.

MS. HENDRICKS: Okay.

THE PRESIDING OFFICIAL: This hearing stands adjourned now at 1:45 p.m., and the record will be closed at this time, however, it will be reopened to admit the Appellant's exhibits provided they're received in a timely manner and any new exhibits will be subject to objection by opposing counsel. Off the record.

* * *

CERTIFICATE
FOR RETURN TO SCHOOL OR WORK

PEEBLES, CHARLES has been under

my care from 1-03-83 to _____

and is able to return to ~~school~~ work on 1-19-83

Limitations/Remarks: Skin rash
under arm.

Dr. RAMESH MEHTA, M.D.

Address ~~9612 S Halsted Street~~
Chicago, Illinois 60628

Phone 779-7200 Date 1-15-83

CERTIFICATE
FOR RETURN TO SCHOOL OR WORK

PEEBLES, CHARLES has been under

my care from 1-03-83 to _____

and is able to return to ~~school~~ work on 1-19-83

Limitations/Remarks: skin rash under arm.

Dr. RAMESH MEHTA, M.D.

Address ~~9612 S. Halsted Street~~ Chicago, Illinois 60628

Phone 779-7200 Date 1-15-83

CERTIFICATE
OR RETURN TO SCHOOL OR WORK

PEEBLES, CHARLES has been under
my care from 1-03-83 to
and is able to return to ~~school~~ (work) on 1-19-83

Limitations/Remarks: skin rash
under arm.

Dr. RAMESH MEHTA, M.D.
~~9612 S. Halsted Street~~
Address Chicago, Illinois 60628
Phone 779-7200 Date 1-15-83

DOUGLAS L. PARRIS, M.D.
8325 SOUTH STONY ISLAND AVENUE
CHICAGO, ILLINOIS 60617
874-7000

April 27, 19 83

Charles Peebles

10242 S. Morgan St.

Chicago, Illinois 60643

FOR PROFESSIONAL SERVICES

This is to certify that Charles Peebles has been under my professional care and was totally incapacitated from January 19, 1983 to April 27, 1983 and is able to return to work on April 28, 1983.

Remarks: Diagnosis - Hypertension, Hemmorrhoids and pain in left knee and right shoulder. He has been treated in my office every 1-2 a week.

D L Parris MD

(Letterhead Of)

UNITED STATES POST OFFICE
CHICAGO, ILLINOIS 60607-9403

DATE: MAR 9 1983

Form 2B

OUR REF: E&LR3:AIMallory:[illegible]:dp

SUBJECT: NOTICE OF CHARGES-REMOVAL

TO: Mr. Charles Peebles-413 50 0663
Distribution Clerk, Full Time
10242 South Morgan
Chicago, Illinois 60643

VIA: CERTIFIED MAIL - RSTD DELY
RETURN RECEIPT REQUESTED
CC: ORDINARY MAIL
PAY LOCATION: 809

This is notice that it is proposed to remove you from the Postal Service no earlier than 30 days from the date you receive this notice. The reasons for this proposed action are:

1. YOU ARE CHARGED WITH BEING ABSENT FROM YOUR SCHEDULED TOUR OF DUTY AT THE MAIN POST OFFICE, WITHOUT PERMISSION, as shown below:

   Since January 3, 1983, and have not returned to duty as of *March 9, 1983.*

This is a violation of requirements of Section 666.81 of the Employee and Labor Relations Manual, (copy attached).

On January 12, 1983, a letter was sent to you which informed you that the reason for your absence must be substantiated. That letter was returned on January 27, 1983. As of *March 9, 1983* you have failed to substantiate your absence.

As a preference eligible employee you have the following rights:

If you do not understand the reasons for this notice, or if you desire to review the material relied on to support these reasons, you may obtain further information, and/or review the material in Room 304, Main Post Office Building, Chicago, Illinois 60607.

You may answer this notice personally, in writing, or both, to Director, Employee and Labor Relations Division, or his designee, Room 304, Main Post Office Building, Chicago, Illinois 60607, between the hours of 8:40 a.m. and 4:00 p.m., Monday through Friday, and may submit affidavits in support of your answer. If you are otherwise on official duty, you will be allowed a reasonable amount of official time to review the material relied on to support the reasons for this notice, to secure affidavits and prepare an answer to this notice. You will be allowed 10 calendar days from the date you receive this notice to submit your answer. Full consideration will be given to any answer you submit. As soon as possible after your answer is received, or after the expiration of the 10-day limit, if you do not answer, you will be given a written decision.

You have the right to file a grievance under the Grievance Arbitration procedures set forth in Article 15, Section 2 of the National Agreement within 14 days of your receipt of this notice.

/s/ PEARLENE THOMPSON
Pearlene Thompson
Supervisor, Mails

(CONSULT POSTMASTER FOR FEES)

1. The following service is requested (check one)
☑ Show to whom and date delivered
☐ Show to whom, date, and address of delivery
2. ☐ RESTRICTED DELIVERY
(The restricted delivery fee is charged in addition to the return receipt fee)
3. TOTAL

4. ARTICLE ADDRESSED TO:
Mr. Charles Peebles
10242 South Morgan
Chicago, Illinois 60643

5. TYPE OF SERVICE
☐ REGISTERED ☐ INSURED
☐ CERTIFIED ☐ COD
☐ EXPRESS MAIL
ARTICLE NUMBER
2293694

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

6. DATE DELIVERED
MAR 2 C 1983

7. ADDRESSEE'S ADDRESS (Only if requested)

8. POSTMARK

9. UNABLE TO DELIVER BECAUSE:

10. EMPLOYEE'S INITIALS

FILES: Airbill 28

P16 2293694

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to
Charles Peebles
10242 So. Morgan
Chicago, IL 60643

CERTIFIED FEE
SPECIAL DELIVERY
RESTRICTED DELIVERY
RETURN RECEIPT SERVICE
CONSULT POSTMASTER FOR FEES

TOTAL POSTAGE AND FEES

POSTMARK OR DATE

MAR 9 1983

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

RESTRICTED DELIVERY

P16

RETURN RECEIPT REQUESTED

RETURN IN 5 DAYS
IF UNDELIVERABLE

UNCLAIMED

UNCLAIMED

UNCLAIMED

RETURN IN 5 DAYS
IF UNDELIVERABLE

3-17

UNITED STATES POSTAL SERVICE
EMPLOYEE
MAIN POST OFFICE BUILDING 304
433 WEST VAN BUREN STREET
CHICAGO, ILLINOIS 60607

DATE 3/23/83
1ST NOTICE
2ND NOTICE
RETURN

RETURNED TO SENDER

Mr. Charles Peebles
10242 South Morgan
Chicago, Illinois 60643

BEST AVAILABLE COPY

(Letterhead Of)
UNITED STATES POST OFFICE
CHICAGO, ILLINOIS 60607-9403

DATE: MAR 25 1983

Form 5
OUR REF: E&LR3:PBHendricks:T:dp

SUBJECT: Letter of Decision

TO: Mr. Charles Peebles
Distribution Clerk, Full Time
10242 South Morgan
Chicago, Illinois 60643

VIA: CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RESTRICTED DELIVERY
CC: ORDINARY MAIL

By notice of March 9, 1983, you were informed of a proposal to remove you from the Postal Service.

You did not answer personally, or in writing, within the allowable time limit to submit an answer.

I find that the reason stated in the Notice of Charges, Charge No. 1, is sustained and fully supported by the evidence and warrant your removal to promote the efficiency of the Service.

It is my decision therefore that you be removed, effective APR 15 1983

You have the right to appeal to the Merit Systems Protection Board immediately but no later than 20 days after APR 15, 1983. If you desire to appeal to the Board your appeal should be sent to the Regional Administrator, Merit Systems Protection Board, Chicago Regional Office, John C. Kluczynski Building, 230 South Dearborn, 31st

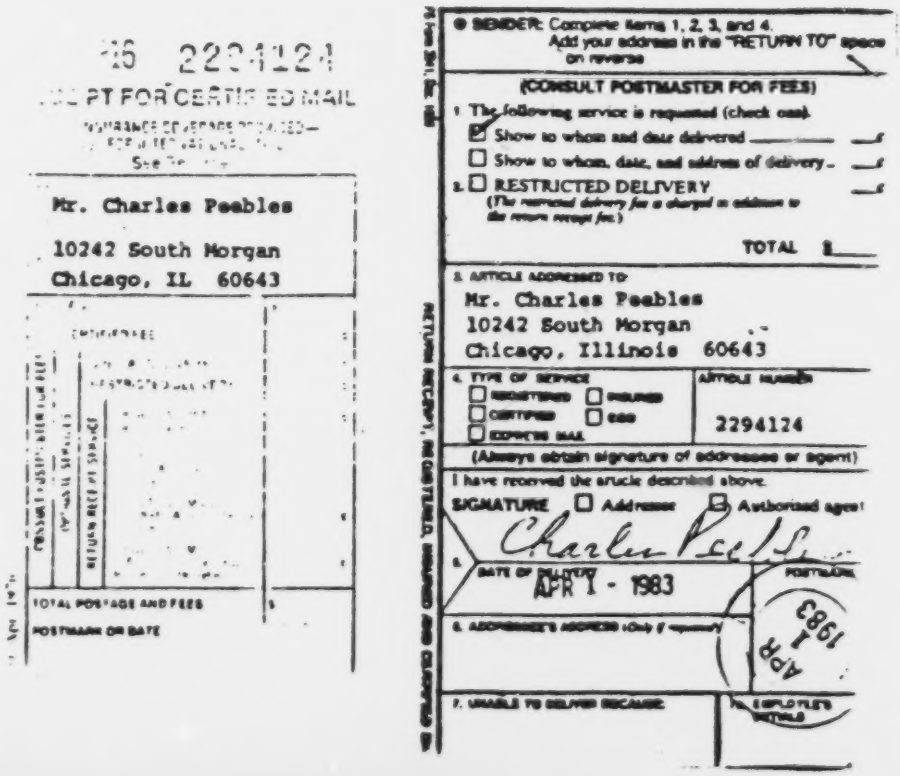
Floor, Chicago, Illinois 60604. Your appeal to the Board must be in writing and give reasons for contesting the action with any offer of proof and pertinent documents you are able to submit.

If you appeal to the Merit Systems Protection Board you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance-Arbitration Procedures. If you appeal to the Merit Systems Protection Board, please provide me with a copy of your appeal.

/s/ FRANK C. GOLDIE
Frank C. Goldie
Postmaster

Attachments

Pages 38349 thru 38362
of the Federal Register
Part XIII



BEST AVAILABLE COPY